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KOMATHY THARMARAJ v. THARMARAJ PAKIRISAMY; HONG LEONG BANK BHD (INTERVERNER)

B

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
WONG KIAN KHEONG JCA
AHMAD KAMAL MD SHAHID JCA
[CIVIL APPEAL NO: N-02(NCvC)(W)-1187-06-2021]
28 OCTOBER 2025

C

Abstract – *A registered title of an individual over a property is held defeasible if the transfer of the property is made through fraudulent means, especially when it is proven that there was a conspiracy between certain parties to defraud the victim, ie, when the fraudulent parties had taken active steps to cause wrongful loss to the detriment of the victim by conspiring and fraudulently misrepresenting to the victim that he was signing documents to charge the property, when in actual fact it was to execute a transfer to another party. Even if the charge of the property is treated as a separate and distinct transaction, and the bank had acted bona fide, the bank charge over the property is also defeasible and ought to be set aside because the transfer and charge pertaining to the property were done concurrently and should be treated as the same fraudulent transaction.*

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LAND LAW: *Charge – Security for loan – Fraud and conspiracy – Registered owner charged property to obtain bank loan – Defendants conspired and fraudulently misrepresented to owner that he was signing documents to charge property when in fact it was to transfer it absolutely to first defendant – Whether owner relied entirely on assurance of defendants that he would remain proprietor of property – Whether defendants took active steps to cause wrongful loss – Whether defendants committed fraud – Whether first defendant's title to property tainted and defeasible – Whether bank's charge over property set aside*

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LAND LAW: *Transfer of property – Validity – Fraud and conspiracy – Registered owner charged property to obtain bank loan – Defendants conspired and fraudulently misrepresented to owner that he was signing documents to charge property when in fact it was to transfer it absolutely to first defendant – Whether owner relied entirely on assurance of defendants that he would remain proprietor of property – Whether defendants took active steps to cause wrongful loss – Whether defendants committed fraud – Whether first defendant's title to property tainted and defeasible*

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I

This case revolved around a dispute between the respondent father ('plaintiff') and his daughter ('first defendant') regarding the ownership of a house wherein they once stayed together. Initially, the plaintiff was the registered owner of a land together with a double-storey terrace house ('property'), *ie*, the subject matter of the dispute. The plaintiff stayed in the

property with his wife, PW2 and his youngest daughter, the first defendant, as well as the first defendant's husband. It was the plaintiff's version that the first defendant had approached him for financial assistance due to difficulties she was in. When the plaintiff told the first defendant that he did not have enough funds to assist her, she then suggested to charge the property as security for a loan, to which he agreed to. The first defendant appointed an advocate and solicitor ('second defendant') from a law firm ('third defendant') to prepare the necessary documentation. The first defendant brought her parents to the office of the third defendant to meet the second defendant. According to the plaintiff, he had told the second defendant that he wanted to assist the first defendant by charging the property in order to obtain a bank loan, but that he ought to remain as the proprietor of the property. The plaintiff contended that the second defendant had informed him that the property must be transferred to the first defendant first in order to obtain the bank loan. The plaintiff did not agree to this and insisted that he was to remain as the registered proprietor of the property, as he wished to pass on the property to all of his children. The plaintiff further contended that the first defendant and the second defendant discussed between themselves in English language, which he did not speak. The second defendant then agreed with his position and asked him to execute certain documents without explaining their contents. The plaintiff had executed them in the belief that they were for the purpose of creating a charge over the property (as security for a loan) and not to effect an absolute transfer of the property to the first defendant. Some time later, the plaintiff, who became suspicious when the first defendant was evasive about the bank loan, undertook a search of the property with the land office. The plaintiff was shocked to find out that the property had been transferred absolutely to the first defendant and had also been charged to the fourth defendant, Hong Leong Bank Berhad ('Hong Leong Bank'). The plaintiff confronted the first defendant. Matters came to a head when he was forced out of the property by the first defendant and her husband. The plaintiff filed an action to claim for the court orders, among others, a declaration that the transfer and the charge of the property were not valid, defeasible and be set aside; the plaintiff was the lawful registered owner of the property and a mandatory injunction that the first defendant return the property to the plaintiff. The High Court allowed the plaintiff's claim. Aggrieved, the first defendant appealed. The issue that arose was whether the first and second defendants had committed fraud and fraudulent misrepresentation to the plaintiff to defraud him by causing him to execute the transfer of the property.

Held (dismissing appeal)
Per Ahmad Kamal Md Shahid JCA delivering the judgment of the court:

(1a) It was clear from the evidence that when the plaintiff had executed the sale and purchase agreement and the memorandum of transfer (Form 14A) at the office of the second and third defendants, the

plaintiff had insisted to both the first and second defendants that he ought to remain a proprietor of the property, despite a charge being registered over it. The plaintiff had been consistent in this assertion, as could be seen in his pleadings and at various junctures during his testimony. The evidence of the plaintiff, PW2, the first and the second defendants clearly showed that the plaintiff was insistent and clear about remaining as a proprietor of the property. However, despite the plaintiff's insistence, the first and second defendant suppressed the fact that the documents executed by the plaintiff were for a transfer of the entire property to the first defendant. The plaintiff had been given assurance that he could sign the said documents, and this led the plaintiff to do so. (paras 36-44)

(1b) It was highly improbable that the plaintiff could read and understand a sale and purchase agreement and the memorandum of transfer. The plaintiff was only educated up Standard Four, and was unable to read and write in English language as well as in Bahasa Melayu. The plaintiff had relied entirely on the first and second defendants' assurance that he would remain a proprietor of the property. Further, the sale and purchase agreement was not initialled by the plaintiff, which was a standard practice in conveyancing, and this added credence to the plaintiff's assertion that he did not know what he was signing and made it more probable than not that the second defendant had colluded with the first defendant in committing fraud against the plaintiff. (paras 46-50)

(1c) Since the second and third defendants admitted that the plaintiff had informed them that the property should remain registered under the plaintiff's name, the second defendant, as an ethical advocate and solicitor, ought to have advised the first defendant (her client) not to proceed with the execution of the sale and purchase agreement and the memorandum of transfer. However, despite the fact that the plaintiff had specifically and unequivocally informed the second defendant that the property should remain registered under his name as proprietor, the second defendant had deceived and misrepresented to the plaintiff by giving assurance that the plaintiff could execute the documents without informing him that the documents were not meant for charging the property, instead it was to transfer to the first defendant. This clearly demonstrated a conspiracy and fraud on the part of the second defendant against the plaintiff. The series of events clearly showed that the first and second defendants, by their conduct, took active steps to cause wrongful loss to the detriment of the plaintiff by conspiring and fraudulently misrepresenting to the plaintiff that he was signing documents to charge the property, and not to transfer it absolutely to the first defendant. (paras 52-55)

(2) The explanation given by the first defendant, that the charge over the property was done in order to cover the medical expenses of the PW2 and to settle the plaintiff's debts, was hard to believe. The amount received by the first defendant through the charge of the property was RM179,505 leaving behind a sum of RM152,505 (minus the sum spent on PW2's medical expenses of RM27,000) without any justification on how the money had been spent by the first defendant. This piece of evidence had discredited the first defendant's defence that the charge over the property was made for the purpose of the PW2's medical expenses. It also showed that this was part of a wider scheme of arrangements by the first defendant to defraud the plaintiff in transferring the property to herself. Thus, the first defendant's contention that the said loan was obtained in order to cover PW2's medical expenses was an afterthought. It was the first defendant who was facing financial difficulties and had requested financial assistance from the plaintiff, to which he had acceded by agreeing to charge the property. (paras 58-66)

(3) The private land search that was conducted by the plaintiff, and also the police report dated the same day, lodged by the plaintiff immediately after discovering the fraudulent transfer, added credence to the plaintiff's case. These acts of performing the land search and the lodgment of a police report after a series of futile enquiries with the first defendant regarding the status of the charge over the property, showed that the plaintiff was genuinely unaware of the said transfer and that he was no longer a proprietor of the property. The conduct of the plaintiff was relevant to ascertain whether the plaintiff was aware of the transfer of the property to the first defendant and whether there was fraud by the first and second defendants. The plaintiff had been misled and fraudulently induced by the first defendant into signing the sale and purchase agreement, and the second and third defendants were complicit in these acts. (paras 69-82)

(4) Even if the charge was treated as a separate and distinct transaction, and Hong Leong Bank had acted *bona fide*, as the first defendant's title was being defeasible as a result of the fraud, she could not lawfully register any interest in favour of Hong Leong Bank. That would necessarily mean that the first defendant's title to the property was also tainted and therefore defeasible. The Hong Leong's bank charge over the property was rightly set aside because the transfer and charge pertaining to the property were done concurrently and should be treated as the same fraudulent transaction. (paras 85 & 86)

(5) This case did not warrant any appellate intervention as the High Court had correctly allowed the plaintiff's claim after evaluating the contemporaneous documents and oral evidence of the witnesses. (para 89)

Case(s) referred to:

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] CLJU 55; [1980] 1 LNS 55 FC ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 89, 340(2)(a), (b), (c)

For the appelant - M Manoharan & M Hariharan; M/s M Manoharan & Co

For the respondent (before 14 April 2025) - A Kevindran; M/s Kevindran K Veni Partnership

For the respondent (after 14 April 2025) - Nadaraja & R Hanita; M/s R Hanita & Assocs

For the intervener - ML Chan; M/s Seow & Megat

[Editor's note: Appeal from High Court, Negeri Sembilan; Civil Suit No: NA22NCVC-1-01-2019 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Kamal Md Shahid JCA:

Introduction

[1] This case revolves a dispute between a father, Mr Tharmaraj a/l Pakirisamy (the respondent/plaintiff) and his daughter, Miss Komathy a/p Tharmaraj (the appellant/first defendant) regarding the ownership of a house wherein they once stayed together.

[2] A copy of this draft judgment had been previously forwarded to my learned brothers, Nantha Balan and Wong Kian Kheong, JJCA. Both of them had agreed to this draft.

[3] Parties are referred to as the plaintiff and the defendants (the first to fourth defendants, whichever is applicable) in their respective capacities in the High Court.

Brief Facts Of The Case

[4] Initially, the plaintiff was the registered owner of a land together with a double-storey terrace house held under Hakmilik No. Geran 126863 Lot 22623, which is situated in Bandar Seremban Utama, Negeri Sembilan (the property), *ie*, the subject matter of the dispute in this case. The plaintiff stayed in the property with his wife, Mrs Amoni a/p Ayappan (PW2), and his youngest daughter, the first defendant, as well as the first defendant's husband.

[5] It was the plaintiff's version that around April 2017, the first defendant had approached him for financial assistance due to the difficulties that she was in.

[6] When the plaintiff told the first defendant that he did not have enough funds to assist her, she then suggested to charge the property as security for a loan. He agreed.

[7] The first defendant appointed Luknes Vengadesh (the second defendant) from Tetuan Luknes, Faridah & Associates (the third defendant) to prepare the necessary documentation.

Note: The second and third defendants are not parties in this appeal.

[8] On or about 10 April 2017, the first defendant brought her parents to the office of the third defendant to meet the second defendant.

[9] According to the plaintiff, he had told the second defendant that he wanted to assist the first defendant by charging the property in order to obtain a bank loan, but that he ought to remain as the proprietor of the property.

[10] The plaintiff contended that the second defendant had informed him that the property must be transferred to the first defendant first in order to obtain the bank loan. The plaintiff did not agree to this and insisted that he was to remain as the registered proprietor of the property, as he wished to pass on the property to all of his children.

[11] The plaintiff further contended that the first defendant and the second defendant discussed between themselves in the English language, which he did not speak. The second defendant then agreed with his position and asked him to execute certain documents without explaining their contents.

[12] The plaintiff had executed them in the belief that they were for the purpose of creating a charge over the property (as security for a loan) and not to effect an absolute transfer of the property to the first defendant.

[13] A few months after the execution of the documents, the plaintiff asked the first defendant about the status of the bank loan. He was informed by the first defendant that the loan was being processed and that they would be informed of its status in writing by the second defendant.

[14] The plaintiff began to be suspicious when the first defendant became evasive about the bank loan.

[15] In December 2017, the plaintiff undertook a search of the property with the land office. He was shocked to find out that the property had been transferred absolutely to the first defendant and had also been charged to the fourth defendant, Hong Leong Bank Berhad (Hong Leong Bank). He lodged a police report on the very same day.

[16] He confronted the first defendant. Matters came to a head when he was forced out of the property by the first defendant and her husband in early April 2018.

In The High Court

[17] The plaintiff filed an action to claim for the court orders, among others, a declaration that the transfer and the charge of the property are not valid, defeasible, and be set aside; the plaintiff is the lawful registered owner of the property and a mandatory injunction that the first defendant return the property to the plaintiff.

[18] Based on the first defendant's defence, the first defendant contended, briefly, that:

(i) the plaintiff had full knowledge and agreed to the transfer of the property to her name;

(ii) the property had been transferred to her for the main reason that her mother, PW2, was undergoing treatment for her ailing kidney problem in a private hospital;

(iii) part of the proceeds of the loan money was used for the treatment of her mother;

(iv) some of the proceeds of the loan money were used to pay Subramaniam Anggumuthu and Selva Kumaran Kumar, to whom the plaintiff was indebted; and

(v) the first defendant denied that the plaintiff could not understand the English language.

Findings Of The Learned High Court Judge

[19] On 27 May 2021, the learned High Court Judge (HCJ) allowed the plaintiff's claim on the following grounds:

(i) there were numerous inconsistencies in the first defendant's case and her testimony in court. Thus, her version of events was a fabric of untruths, woven together to cloak her misdeeds;

(ii) on the proficiency of the plaintiff's English language, there was no reason to disbelieve the plaintiff's testimony that none of the courses attended by him required him to read or write in English. For example, the Tractors Malaysia course was on how to operate a tractor. Whatever documents he signed when he was still working, had been prepared by others;

(iii) the plaintiff was misled and fraudulently induced by the first defendant into signing the SPA, believing that it was a charge to secure a loan taken in the name of the first defendant;

(iv) the letter of authorisation dated 10 April 2017 by which two individuals were paid a certain portion of the proceeds of the sale had also been signed through a fraudulent misrepresentation by the first defendant;

(v) the first defendant was privy to the fraud by which she had acquired title to the property, and this, in turn, meant that her registered title was defeasible;

(vi) the title of the first defendant was also defeasible on the alternative ground that the transfer of the property had been effected by means of a misrepresentation by the first defendant to the plaintiff; and

(viii) Hong Leong Bank, as chargee, had obtained its interest in the property through its dealings with the first defendant. Accordingly, its registered interest was defeasible, notwithstanding that it was not complicit in the fraud by the first defendant, and that it had no knowledge of the fraud.

The Appeal

[20] Aggrieved with the decision of the learned HCJ, the first defendant had lodged an appeal to the Court of Appeal. There is no appeal filed by the second, third, and Hong Leong Bank despite the fact that the learned HCJ had ordered that the first defendant, together with the second and third defendants, were jointly and severally liable to pay costs of RM20,000 to the plaintiff.

[21] However, Hong Leong Bank had applied to intervene in this appeal *vide* notice of motion in encl. 10. Enclosure 10 was allowed on 1 November 2021.

[22] The issue for determination of this court in this appeal is whether the first and second defendants had committed fraud and fraudulent misrepresentation to the plaintiff to defraud him by causing him to execute the transfer of the property.

Our Decision

[23] The plaintiff's claim is for the registered title of the first defendant and the registered charge held by Hong Leong Bank over the property to be held defeasible on the ground that the transfer of the property from the plaintiff to the first defendant was fraudulent and that the title of the property should be reverted to the plaintiff.

[24] The first defendant submits that the learned HCJ had erred when His Lordship concluded that there was a conspiracy between the first and second defendants to defraud the plaintiff when there was no evidence to support such a conclusion.

[25] Section 340 of the National Land Code (NLC) is a section which confers indefeasibility of title or interest on a *bona fide* purchaser for valuable consideration. Although it is true that once the title is registered, it becomes indefeasible, there are exceptions to this general rule, as provided for under the NLC.

[26] Section 340 of the NLC reads as follows:

> *340. Registration to confer an indefeasible title or interest, except in certain circumstances*
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) *The title or interest of any such person or body shall not be indefeasible:*
>
> (a) *in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or*
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):-
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.
>
> (emphasis added)

[27] From the above provision, it is clear that the indefeasibility of title does not apply as a result of at least one of the three vitiating factors laid out in s. 340(2)(a), (b) or (c) of the NLC. Thus, the title can be defeated due to fraud or misrepresentation as stated under s. 340(2)(a) or where the

registration is obtained under s. 340(2)(b) of the NLC by forgery, or by means of an insufficient or void instrument or under s. 340(2)(c) if the title or interest was unlawfully acquired.

[28] The existence of fraud is a question of fact. It depends on the circumstances of each particular case.

[29] In the Federal Court case of *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] CLJU 55; [1980] 1 LNS 55; [1980] 1 MLRA 562; [1980] 2 MLJ 136, Raja Azlan Shah CJ (as His Late Highness then was) expressed as follows:

> (9) **Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case.** Decided cases are only illustrative of fraud. **Fraud must mean "actual fraud, *ie*, dishonesty of some sort"** for which the registered proprietor is a party or privy. Fraud is the same in all Courts, but such expressions as 'constructive fraud' are ... inaccurate. "But" 'fraud'... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled." (per Romilly M.R. in *Green v. Nixon* [1857] 23 Beav. 530 & 535)
>
> (emphasis added)

[30] Fraud could be inferred from circumstantial evidence, with the additional condition that there had to be a basis for such evidence and it was not just a mere suspicion. In the case of *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* [2006] 2 CLJ 409; [2006] 1 MLRA 420; [2006] 3 MLJ 1; [2001] 1 AMR 477, Gopal Sri Ram JCA (as His Lordship then was) held:

> [84] ... While mere suspicion is insufficient, it is not the law that a litigant who alleges fraud must unravel each and every act of the person accused of fraud. Like any other fact, *fraud may be inferred from circumstantial evidence with the added proviso that there must be a foundation of evidence and not mere suspicion*. We would, in this context refer to *Satis Chandra Chatterji v. Satish Kantha* AIR [1923] PC 73 where Lord Atkinson said:
>
> > *Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them - proved by established facts or inferences legitimately drawn from those facts taken together as a whole*. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape.
> >
> > (emphasis added)

[31] It is settled that the standard of proof for fraud in a civil case is on the balance of probabilities. The Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLRA 191; [2015] 5 MLJ 1; [2015] 5 AMR 487 held:

A [52] We therefore reiterate that we agree and accept the rationale in In *Re B (children)* (*supra*) **that in a civil claim even when fraud is alleged the civil standard of proof, that is on the balance of probabilities, should apply**. And perhaps it is not out of place here to restate the general rule at common law that, "in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission
B of a crime need only be on a balance of probabilities".

(emphasis added)

[32] Hence, the burden is on the plaintiff to prove on the balance of probabilities that the first defendant's registered title is defeasible and the title is not conclusive under s. 89 of the NLC.

C

[33] Having perused the evidence presented in the High Court, we find that there is clear evidence which showed that fraud and conspiracy to defraud the plaintiff were concocted by the first and second defendants.

[34] The first defendant had participated in the scheme with the second
D defendant to fraudulently transfer the property to the first defendant.

[35] This can be gleaned from the following facts and circumstances of the case:

(i) there are two conflicting versions of the event as to what actually
E happened in this case;

The Plaintiff's Version

(ii) the plaintiff's version is that the plaintiff was the registered proprietor of the property;

F (iii) according to the plaintiff, the first defendant asked him if she could borrow money from him. As the plaintiff did not have the money to lend to the first defendant, at the suggestion of the first defendant, the plaintiff agreed to charge the property in favour of a bank for a loan to be taken out by her;

G (iv) this is evident from the testimony of the plaintiff (PW1) and his wife, Mrs Amoni a/p Ayappan (PW2), who testified as follows:

Plaintiff (PW1)

Soalan : Boleh kamu terangkan perkara ini secara lanjut?

H Jawapan: Pada atau lebih kurang pada bulan April 2017, *Komathy telah mengalami masalah kewangan dan telah meminta bantuan dari saya untuk meminjamkan wang kepadanya. Apabila saya memberitahunya bahawa saya tidak mempunyai wang yang mencukupi, Komathy telah mencadangkan untuk menggadaikan rumah saya dan saya*
I *telah bersetuju dengan permintaan Komathy*.

(emphasis added)

(See: Q&A No. 3 of the plaintiff's witness statement, encl. 4, p. 56);

Mrs Amoni Ayappan (PW2)

Mr. Kevin: My Lord before we start I have one more additional question before the cross-examination starts. Pn. Amoni boleh kamu terangkan kepada Mahkamah apa yang berlaku di pejabat Defendan kedua apabila kamu telah pergi ke sana bersama suami kamu.

SP2 : Sehari sebelum kami pergi ke Pejabat Peguam, anak perempuan saya telah menggadaikan barang kemas saya sebanyak 50 ke 60 poun barang kemas saya untuk dibayar kepada peguam kami untuk kes lain, Dia kata dia tak mampu untuk bayar duit bunga gadaian tersebut. *Dia minta saya untuk beritahu suami saya untuk gadaikan rumah dan dapatkan wang sebanyak RM150,000.00. Dia yang bercakap dengan terus dengan suami saya*. Saya akan tebuskan semua barang kemas dari kedai pajak dan duit bakinya saya memerlukannya. *Suami saya kata boleh dapatkan RM150,000.00 tetapi dia menegaskan nama dia harus dikekalkan sebagai pemilik*.

Keesokkan (*sic*) harinya bila kami pergi ke pejabat peguam, *Komathi dan Pn. Luknes berbincang dan suami saya tetap dengan pendirian nama dia harus dikekalkan sebagai pemilik*. Pada awalnya komathi memberitahu suami saya di mana saya duduk di sebelah suami saya, Peguam kata tidak boleh letak dua nama. Hanya boleh letak satu nama sahaja dalam pemilikkan (*sic*).

(emphasis added)

(See: notes of proceedings, encl. 4, p. 131);

(v) the plaintiff alleged that on 10 April 2017, the first defendant took him and his wife (PW2) to meet the second defendant at the third defendant's office, where the following conversation took place:

(a) the plaintiff told the second defendant that he only wanted to help the first defendant by charging the property and that his name should continue to be on the title;

(b) the second defendant explained that it was not possible and the property had to be transferred to the first defendant;

(c) in response, the plaintiff alleged that he maintained that he wanted his name in the title;

(d) the first and second defendants said something to each other in the English language, a language he claimed he did not understand;

(e) after this conversation in the English language had taken place, the second defendant agreed to his suggestion and asked him to sign several documents;

(f) as the documents were in the English language, he did not understand their contents, and nor were the contents translated to him in Tamil before he signed the documents; and

(g) the plaintiff signed the documents believing that he was signing documents to charge the property and not to transfer it absolutely to the first defendant. His wife, Mrs Amoni a/p Ayappan (PW2), and the first defendant's husband were also present at the meeting with the second defendant;

(vi) the narrative of the plaintiff's evidence can be gleaned from his witness statement. The relevant questions and answers are reproduced below:

5. Soalan: Apakah yang berlaku di pejabat Defendan Ke-3 apabila kamu berjumpa dengan Puan Luknes?

Jawapan: Apabila *sampai di pejabat Puan Luknes saya telah memberitahu Puan Luknes secara khususnya bahawa saya hanya ingin menolong Komathy dengan menggadaikan rumah tersebut supaya Komathy dapat mengambil pinjaman bank untuk dirinya dan nama saya harus dikekalkan sebagai pemilik rumah tersebut Puan Luknes seterusnya telah memberitahu saya bahawa Hartanah tersebut harus dipindahmilik sepenuhnya ke atas nama Komathy untuk mendapatkan pinjaman bank.*

6. Soalan: Apakah respons kamu kepada Puan Luknes?

Jawapan: *Saya* seterusnya telah *memberitahu Puan Luknes bahawa saya tidak bersetuju untuk rumah tersebut dipindahmilik sepenuhnya ke atas nama Komathy dan menyatakan dengan tegas bahawa nama saya harus dikekalkan sebagai pemilik rumah tersebut* kerana saya ingin mewariskan Hartanah tersebut kepada kesemua anak-anak saya. *Selepas saya telah bertegas mengenai rumah tersebut kekal di atas nama saya, Komathy, dan Puan Luknes telah berbincang sesama sendiri di dalam Bahasa Inggeris dan tidak difahami oleh saya. Puan Luknes seterusnya telah bersetuju dengan permintaan saya dan telah menyuruh saya menandatangani dokumen-dokumen tanpa menjelaskan kandungan dokumen-dokumen tersebut*.

7. Soalan : Bagaimana kamu tahu bahawa kamu boleh menggadaikan rumah tersebut tanpa membuat pindahmilik;

Jawapan : Saya tahu kerana saya pernah membuat gadaian sesebuah hartanah saya kepada bank di mana pinjaman adalah di atas nama anak saya dan 1/3 bahagian hartanah tersebut kekal di atas nama saya.

8. Soalan : Adakah kamu faham kandungan dokumen- dokumen yang kamu telah tandatangan?

Jawapan : *Saya tidak faham apa yang saya tandatangani kerana saya tidak tahu membaca Bahasa Inggeris mahupun Bahasa Malaysia kerana saya hanya belajar sehingga Darjah 4. Saya pun telah menandatangani dokumen-dokumen tersebut dalam kepercayaan bahawa dokumen-dokumen tersebut adalah untuk menggadaikan rumah saya dan bukannya untuk memindahmilik rumah sepenuhnya kepada Komathy tersebut kerana saya telah memberikan arahan yang jelas kepada Puan Luknes.*

(emphasis added)

(See: the plaintiff's witness statement, encl. 4, pp. 57-58);

The First Defendant's Version

(vii) the first defendant contended that it was the plaintiff who urged her to raise money on the security of the property for the purposes of paying for the treatment of her mother, Mrs Amoni a/p Ayappan (PW2), who was undergoing dialysis treatment;

(viii) according to the first defendant, it was decided between the plaintiff and the first defendant to enter into a sale and purchase agreement for the purpose of the loan;

(ix) the first defendant then applied for a loan from Hong Leong Bank, and her application for a loan of RM224,000 was approved;

(x) on 10 April 2017, the first defendant, her husband, Mrs Amoni a/p Ayappan (PW2), and the plaintiff met with the second defendant at her office; and

(xi) in the presence of the first defendant and the other two persons mentioned in the foregoing paragraph, the plaintiff asked the second defendant if his name could continue to appear as registered proprietor. It is also an agreed fact that the second defendant told him that it was not possible. This is evident from the plaintiff's testimony, as well as the testimony of the second defendant when she said as follows:

Second defendant

25. Soalan : Apakah reaksi Plaintif setelah anda menjelaskan terma-terma yang terkandung di dalam Perjanjian Jual Beli tersebut dan dokumen-dokumen berkaitan?

Jawapan : *Plaintif ada menyatakan hasratnya untuk dinamakan sebagai salah seorang pembeli di dalam Perjanjian Jual Beli tersebut.*

26. Soalan : Apakah tindakan Puan pada masa itu?

Jawapan : *Saya memberitahu Plaintif bahawa saya menyediakan Perjanjian Jual Beli tersebut atas arahan anak guam saya iaitu Defendan Pertama yang menyatakan Plaintif menjual hartanah tersebut kepada anak beliau. Pinjaman bank juga diluluskan untuk "First Party" loan melalui satu surat tawaran bertarikh 3 April 2017 dan saya tidak ada arahan untuk menyediakan Perjanjian Jual Beli untuk memasukkan nama Plaintif dan Defendan Pertama sebagai pembeli mengikut surat tawaran tersebut. Selain itu, Plaintif juga tidak pernah menyatakan niat beliau untuk mengekalkan sebahagian hak dalam hartanah tersebut sebelum 10.4.2017.*

(emphasis added)

(See: the second defendant's witness statement, encl. 4, pp. 83 to 84).

[36] It is clear from the evidence, on 10 April 2017, the day that the plaintiff had executed the sale and purchase agreement and the memorandum of transfer (Form 14A) at the office of the second and third defendants, although some of the details of what took place at the meeting are in dispute, we find that the plaintiff had insisted to both the first and second defendants that he ought to remain a proprietor of the property, despite a charge being registered over it.

[37] The plaintiff has been consistent in this assertion, as can be seen in his pleadings and at various junctures during his testimony.

(See: notes of proceedings, encl. 4, pp. 101, 102, 110, 111, 115,116 & 129).

[38] The first defendant also admitted that the plaintiff had informed the second defendant that he wished to remain as a proprietor of the property. The relevant part of the testimony is reproduced as follows:

Mr. Kevin : Let's go to 10 April 2017, Semasa puan pergi ke pejabat defendan kedua. Semasa di pejabat defendan kedua, ada tak ayah puan menyatakan bahawa dia bersetuju untuk menggadaikan rumah tersebut tetapi nama beliau harus kekal sebagai salah seorang pemilik rumah tersebut. Ada tak dia beritahu perkara itu.

SD1 : Dia ada beritahu dendan (*sic*) Puan Luknes.

(See: notes of proceedings encl. 4, p. 146).

[39] The second defendant further confirmed the testimony of the first defendant when she said as follows:

Hakim : Tapi ada beliau mengatakan bahawa dia hendak mengekalkan dirinya sebagai pemilik.

SD2 : Semasa hadir di pejabat pada hari tersebut.

Hakim : Cuma pada hari tersebut dia katakan (*sic*) saya ingin kekal sebagai pemilik sebahagian hartanah tersebut. Apa sebenarnya yang dia katakan kepada puan.

SD2 : Dia kata dia ingin mengekalkan namanya didalam geran hartanah tersebut.

(See: notes of proceedings, encl. 4, pp. 168 to 169)

[40] More importantly, we find that the plaintiff's wife (PW2) had also testified that the plaintiff had insisted on remaining a proprietor of the property.

(See: para. (iv) above).

[41] The evidence of the plaintiff, the plaintiff's wife (PW2), and the first and second defendants clearly shows that the plaintiff was insistent and clear about remaining as a proprietor of the property.

[42] We found that, despite the plaintiff's insistence, the first and the second defendant suppressed the fact that the documents executed by the plaintiff were for a transfer of the entire property to the first defendant.

[43] It is to be noted that there was a brief discussion between the first and the second defendants in English language after his insistence and prior to the execution of the transfer documents.

[44] After the plaintiff had voiced his stand to the first and second defendants, the plaintiff was given an assurance that he could sign the said documents, and this led the plaintiff to do so.

[45] The first defendant had also informed the plaintiff that his name would also be reflected as a proprietor. (See: notes of proceedings, encl. 4, p. 116).

[46] Looking at the totality of the evidence and the background of the plaintiff, we are in the agreement with the plaintiff's submission that it is highly improbable that the plaintiff could read and understand a sale and purchase agreement and the memorandum of transfer based on the following grounds:

(i) the plaintiff was a rubber tapper in the estates who then went on to become a mechanic;

(ii) the plaintiff is only educated up to Standard Four, and that too, almost 60 years prior to the signing of the transfer documents;

(iii) the plaintiff is unable to read and write in English language as well as in Bahasa Melayu;

(iv) the plaintiff relied entirely on the first and second defendant's assurance that he would remain a proprietor of the property; and

A (v) the plaintiff had repeatedly asserted in his testimony that he had trusted his daughter, *ie*, the first defendant, in the whole transaction. (See: notes of proceedings, encl. 4, pp. 111, 112 & 114).

[47] The first and second defendants tried to portray that the plaintiff knew how to write and read the English language and Bahasa Melayu and therefore B knew what he was signing by adducing documents, such as a tractors Malaysia's certificate of attendance, as well as other documents that the plaintiff had signed.

(See: encl. 5, pp. 283 to 289).

C **[48]** However, based on our findings in para. 46 above, the plaintiff is not an educated person who is able to read and write in English language and Bahasa Melayu. This was confirmed by the plaintiff in his testimony, when he confirmed that none of the documents were prepared by him, and the courses he attended were vocational courses that did not require him to D write.

[49] It is also the plaintiff's testimony that the second defendant had given him a bundle of documents to execute without explaining the terms of the said documents.

E **[50]** Further, we find that the fact that the sale and purchase agreement dated 10 April 2017 was not initialled by the plaintiff, which is a standard practice in conveyancing, adds credence to the plaintiff's assertion that he did not know what he was signing and make it more probable than not that the second defendant had colluded with the first defendant in committing fraud against the plaintiff.

F **[51]** More importantly, we find in "fakta-fakta yang dipersetujui antara plaintif dan defendan ke-2 dan ke-3" in paras. 3 and 4, it was stated as follows:

> 3. Pada atau lebih kurang pada 10 April 2017, Plaintif dan Defendan G Pertama telah hadir bersama-sama di Pejabat Defendan Ke-3.
>
> 4. **Plaintif telah memberitahu Defendan Ke-2 bahawa Hartanah tersebut harus kekal di atas nama Plaintif.**
>
> (emphasis added)

[52] We are of the view that, since the second and third defendants H admitted that the plaintiff had informed them that the property should remain registered under the plaintiff's name, the second defendant, as an ethical advocate and solicitor, ought to have advised the first defendant (her client) not to proceed with the execution of the sale and purchase agreement and the memorandum of transfer (Form 14A).

I

[53] However, despite the fact that the plaintiff had specifically and unequivocally informed the second defendant that the property should remain registered under his name as proprietor, the second defendant had deceived and misrepresented to the plaintiff by giving assurance that the plaintiff could execute the documents without informing him that the documents were not meant for charging the property instead to transfer to the first defendant.

[54] In our view, this dearly demonstrates a conspiracy and fraud on the part of the second defendant against the plaintiff. This is especially so, since prior to informing the plaintiff that his name could remain on the property, the second defendant had discussed the matter with the first defendant in English language – a language that the plaintiff contended he did not understand.

[55] Viewed in totality, this series of events clearly shows that the first and second defendants, by their conduct, took active steps to cause wrongful loss to the detriment of the plaintiff by conspiring and fraudulently misrepresenting to the plaintiff that he was signing documents to charge the property, and not to transfer it absolutely to the first defendant.

[56] Based on what we have discussed above, the learned HCJ made the following findings:

> 21. ...
>
> (c) under cross examination, both the first defendant and the second defendant admitted that the plaintiff had wanted to remain on the title as proprietor. However, this was at odds with the first defendant's pleaded case, which had stated that it was her father's idea to transfer the land to her. The first defendant never explained the inconsistency between her pleaded case and her testimony in court;
>
> (d) the first defendant testified that it was the plaintiff who had planned the whole transaction. However, this was contradicted by the second defendant, who stated that it was the first defendant who had contacted her, who had given her instructions, and indeed who was her client on record; and
>
> (e) if indeed it was true that the plaintiff had wanted to transfer the property to her, then it would have been far simpler to effect a transfer – without consideration – rather than documenting the transaction as a sale and purchase of property. Alternatively, the plaintiff could have provided the property as third party security to the bank for a loan to be obtained by the first defendant. If a financier required the borrower to be of a certain age and to also be the registered proprietor – for it may have been difficult for the plaintiff to have obtained a loan without any visible source of repayment - then he could have transferred a half share of the

property to the first defendant and re-mortgaged it. These alternative solutions would have all retained the plaintiff as a registered proprietor;

(f) the plaintiff's account of events was corroborated in all material respects by his wife, Mrs. Amoni. Having witnessed their demeanour on the witness stand, 1 saw no reason to disbelieve their testimonies;

...

23. The undisputed evidence was that the plaintiff was educated only up to Standard Four. He started work at 11 years old, and had been a rubber tapper. At retirement in 2004, he was a foreman at the Kirby estate. By his own evidence, he did not read or write English, and hence was not able to verify the contents of the documents he had executed on 10 April 2017.

24. The first defendant disputed his contention that he was unable to read or write in English, and as evidence pointed to certificates that had been issued to the plaintiff for courses that he had attended in the course of employment. The plaintiff explained at trial that none of these courses required him to be able to read or write. For example, the Tractors Malaysia course was on how to operate a tractor. Whatever documents he signed when he was at work had been prepared by others.

25. I saw no reason to disbelieve the plaintiff's testimony.

[57] Given the facts and circumstances of the case and contemporaneous documents presented before the court, we see no reason to disagree with His Lordship's findings.

Medical Expenses

[58] The first defendant in her witness statement Q&A No. 9 had stated that the charge over the property was done in order to cover the medical expenses of the first defendant's mother/plaintiff's wife (PW2) and to settle the plaintiff's debts.

[59] However, we find that the explanation given by the first defendant is hard to believe. This is because based on the receipts produced by the first defendant (see: encl. 6, pp. 369 to 441), the total amount spent on the plaintiff's wife's medical expenses, after the disbursement of the said loan sum to the first defendant on 10 October 2017, is only RM9,252.50, a figure far lower than the loan amount received by the first defendant.

[60] The first defendant, during cross-examination, had stated that only approximately RM27,000 was spent for her mother's medical expenses and further that not all of the money received by her was spent for the said medical expenses. This can be seen from her testimony as follows:

First defendant

Mr. Kevin: Boleh kamu terangkan berapa jumlah, ini adalah dokumen kamu, resit-resit perbelanjaan perubatan ini from 10.10.2017 semasa kamu menerima RM179,000.00 ini dari Tarikh (*sic*) tersebut (*sic*) sehingga ibu kamu keluar. Puan ingat berapa jumlah yang dibelanjakan yang kamu katakana (*sic*) telah dibelanjakan untuk ibu kamu.

SD1: Untuk perubatan;

Mr. Kevin: Ya. Do you remember the sum;

SD1 : Roughly plus and minus dalam RM3k satu bulan, until July means it's comes about so it's 9 months. So 9 times 3.

Mr. Kevin : RM27,000.00

SD1 : Ya.

Mr. Kevin : Jadi setuju dengan saya bahawa kesemua RM179,505.00 tidak digunakan untuk keperluan perubatan dialysis ibu puan.

Mr. Kevin : Pn. Setuju selepas 10.10.2017, perbelanjaan yang kamu katakan yang kamu belanja untuk perubatan ibu puan adalah lebih kuran (*sic*) RM27,000.00.

SD1 : Betul

Mr. Kevin : Jadi setuju dengan saya daripada RM179,505.00 ini yang puan telah terima bukan semuanya telah dibeianjakan untuk perubatan ibu puan (*sic*). Setuju?

SD1 : Ya, setuju.

(See: notes of proceedings, encl. 4, pp. 143 to 144).

[61] Based on the evidence given by the first defendant, the amount received by the first defendant on 10 October 2017 through the charge of the property was RM179,505, leaving behind a sum of RM152,505 (minus the sum spent on PW2's medical expenses of RM27,000) without any justification on how the money had been spent by the first defendant.

[62] This piece of evidence had discredited the first defendant's defence that the charge over the property was made for the purpose of the plaintiff's wife's medical expenses. It also shows that this is part of a wider scheme of arrangements by the first defendant to defraud the plaintiff in transferring the property to herself.

[63] The first defendant had also stated that she had given the plaintiff approximately RM100,000 in a timeframe of three to four months to pay off his debts. However, we find that this evidence cannot be true, as she had adduced no documentary evidence, nor was there any testimony from any of her witnesses to that effect.

[64] If it is true that the transfer of the said property was done to obtain a loan to cover the plaintiff's wife's medical expenses and to repay the debts allegedly owed by the plaintiff, why then must the loan sum be released in instalments by the first defendant to the plaintiff.

[65] Therefore, we are of the view that the first defendant's contention that the said loan was obtained in order to cover the plaintiff's wife's medical expenses is an afterthought.

[66] In fact, it is the plaintiff's testimony, corroborated by PW2's testimony, that it was indeed the first defendant who was facing financial difficulties and had requested financial assistance from the plaintiff, to which he had acceded by agreeing to charge the property.

[67] On this issue, the learned HCJ had come to the following finding of fact, when His Lordship held as follows:

> 21. ...
>
> (a) in her defence, the defendant had stated that the proceeds of the loan from Hong Leong Bank had been used pay off debts that were said to be owned by the plaintiff to the two individuals and had also been used by the plaintiff and the first defendant to pay for the medical treatment of Mrs Amoni at a private hospital. Now, the loan amount was RM224,000.00 of which RM44,495.00 had been used to pay the individuals named at paragraph 17 above, leaving a balance of RM179,505.00. Under cross examination, first defendant admitted that not all of the reminder of the proceeds of the loan had been used to pay her mother's medical bills. By her own testimony, the amount expended on the bills could not have exceeded RM27,000.00 which left a substantial portion of money – over RM150,000.00 – unaccounted for;
>
> (b) If the first defendant was to believe, the rest of the money had been used by the plaintiff. There was, however, no documentary evidence before the court of any transfer or remittance from the first defendant to the plaintiff;

[68] Based on the evidence presented before this court, we are of the view that the learned HCJ has made correct findings, and we see no reason to interfere with it.

Conduct Of The Plaintiff

[69] We find that the private land search that was conducted by the plaintiff on 26 December 2017, and also the police report dated the same day, lodged by the plaintiff immediately after discovering the fraudulent transfer, adds credence to the plaintiff's case.

[70] These acts of performing the land search and the lodgement of a police report after a series of futile enquiries with the first defendant regarding the status of the charge over the property, show that the plaintiff was genuinely unaware of the said transfer and that he was no longer a proprietor of the property.

[71] We are also of the view that the conduct of the plaintiff is relevant to ascertain whether, prior to 26 December 2017, the plaintiff was aware of the transfer of the property to the first defendant and whether there was fraud by the first and second defendants.

[72] On this issue of the conduct of the plaintiff, the learned HCJ had stated:

> 21. ...
>
> (g) upon finding out that the property had been transferred to the first defendant, the plaintiff made a police report on 26 December 2017 against her. This police report was exhibited at trial. Its existence was not disputed. Yet, the first defendant testified that:
>
> > Sebelum kehabisan baki duit pinjaman untuk rawatan ibu saya, ayah saya telah meminta duit pinjaman yang saya ada, untuk membayar hutang-hutang peribadinya. Selepas saki baki ke semua duit pinjaman telah habis digunakan, Plaintif telah bangkit kan isu bahawa Plaintif tidak ada pengetahuan tentang perjanjian jual beli yang ditandatangani tersebut.
> >
> > (See Q&A 11 of WSD2)
> >
> > According to the first defendant's testimony, this had happened sometime after 1 July 2018 (see her answer to the preceding question in WSD2). However, this could not have been true, because the plaintiff had already made his police report in December 2017. If it was true that the plaintiff had changed his tune only after the money ran out, then this must have happened in December 2017, when the plaintiff lodged the police report; and
>
> (h) Furthermore, the first defendant proffered no explanation why the plaintiff, having come up with the idea of transferring the property to her, suddenly changed his mind in December 2017. If the first defendant was to be believed, the plaintiff was a 70-plus year old man whose creditors abound. Why was he so much in debt? Who did he owe? Did he, in his golden years, lead a life of wanton profligacy? We were not told.
>
> 22. Each of the factors above may not have been, on its own, decisive. Taken together, however, they painted a picture that proved, in my considered view, that the version of events put forth by the first defendant was a fabric of untruth, woven together to cloak her misdeeds.

[73] Based on the evidence produced before the court, we see no basis for disturbing the findings of the learned HCJ.

[74] Considering the totality of the evidence and contemporaneous documents tendered during the trial, we are of the view that:

(i) the plaintiff had agreed to use his property as collateral to provide financial assistance to the first defendant, *albeit* with one specific and express condition; that he should remain as a proprietor of the property;

(ii) the plaintiff had also testified that the second defendant had told him it was fine for him to execute the documents prepared by her even after he had notified the second defendant of his clear and unequivocal intention of remaining as a proprietor of the property. This was also vouched for by the plaintiff's wife (PW2), wherein she had stated that the plaintiff was told that his name would be in the grant of title;

(iii) the plaintiff had executed the documents prepared by the second defendant based on the fraudulent representation given by the first and second defendants that he would remain a proprietor of the property, and not understanding nor knowing the contents of the documents that he had executed;

(iv) the plaintiff is a Standard Four educated former estate worker who was unable to read or converse fluently in English language or Bahasa Malaysia, the languages in which the transfer documents were prepared;

(v) based on the receipts produced by the first defendant, the total amount spent on the plaintiff's wife's (PW2) medical expenses, after the disbursement of the said loan sum to the first defendant on 10 October 2017, is only RM9,252.50, which is a far cry from the loan amount received by the first defendant;

(vi) the first defendant had also testified during cross-examination that only approximately RM27,000 was spent for her mother's medical expenses and further that not all of the monies received by her were spent for the said medical expenses;

(vii) the plaintiff's conduct on 26 December 2017, *ie*, the carrying out of a private land search, enquiring the status of the land ownership and the police report that was subsequently made upon the discovery of the fraudulent transfer of the said property is indicative of the fact that the plaintiff genuinely was not aware of the transfer of the said property that had taken place;

(viii) the very fact that the second defendant did not follow the common and prudent conveyancing practice by not explaining the contents of the documents (as confirmed by SP2 in her testimony), and failure to get the plaintiff to initial every page of the sale and purchase agreement dated 10 April 2017, make it more probable than not that the second defendant had colluded with the first defendant in committing fraud against the plaintiff; and

(ix) the transfer of the property was done fraudulently by the first, second, and third defendants, and the second defendant had knowledge of the fraud committed by the first defendant and was complicit in the fraudulent transfer.

[75] The learned HCJ in his grounds of judgment had stated:

> Findings of fact by the court
>
> 21. Having carefully considered the evidence in this case, I came to view that the plaintiff's version of events was to be preferred over that of the first defendant. There were numerous inconsistencies in the first defendant's case and in her testimony in court ...

[76] The learned HCJ further made findings of fact when His Lordship said as follows:

> 30. Having regard to the totality of the facts before me, I was of the view that the plaintiff had been misled and fraudulently induced by the first defendant into signing the SPA, believing that it was a charge to secure a loan taken in the name of the first defendant, his daughter. The first defendant had deliberately and dishonestly led her father, the plaintiff, to believe that the documents that he was signing at the lawyer's office were to secure the property for a loan, and that the plaintiff would remain the registered proprietor of the property. By reason of her acts, the first defendant had knowingly deprived the plaintiff of his rights as proprietor. I had found that the second and third defendants were complicit in these acts, and neither have appealed against this determination.
>
> 31. I also found that the letter of authorisation dated 10 April 2017 by which the two individuals were paid a certain portion of the proceeds of sale had also been signed through a fraudulent misrepresentation by the first defendant.

[77] Based on the findings of the learned HCJ, they clearly show that His Lordship had assessed all the facts and documents tendered before him before concluding that the plaintiff had been misled and fraudulently induced by the first defendant into signing the sale and purchase agreement, and the second and third defendants were complicit in these acts.

[78] Further, we are of the view that the learned HCJ, being faced with two conflicting versions of facts, is entitled to ascertain which version was more probable and arrive at a specific finding of fact.

[79] The learned HCJ had all the relevant and contemporaneous documents, *ie*, witnesses' statements, *etc*, to draw a reasonable inference from them.

[80] Therefore, we are of the opinion that the learned HCJ is entitled to accept which of the two versions is true because the learned HCJ had the opportunity to analyse the documentary evidence and the testimonies of the witnesses, as well as the facts of the case in its entirety, before accepting the evidence adduced by the plaintiff as credible.

[81] The findings of fact of the learned HCJ will only be disturbed by this court if the learned HCJ was plainly wrong in the evaluation of the evidence. It is for the first defendant to establish that there was a misdirection by the learned HCJ to warrant interference by this court. Unfortunately, the first defendant has not demonstrated any such error on the facts of this case which would warrant appellate intervention.

[82] Based on the facts and circumstances of the case and evidence tendered before the court, it cannot be said that the findings and conclusions of the learned HCJ are findings which do not accord with the probabilities of the case taken as whole or the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

(See: *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395; [1995] 2 MLRA 432; [1996] 3 AMR 3506. Hence, we see no reason to disturb the findings of the learned HCJ).

The Indefeasibility Of The Fourth Defendant's (Hong Leong Bank) Charge Over The Property

[83] Hong Leong Bank pleads that it had, at all material times, acted in a *bona fide* manner with all parties in relation to the loan transaction where it was represented by Messrs Shariff & Khoo.

[84] It admitted that as a registered chargee, Hong Leong Bank stands or falls with the first defendant. The first defendant had charged the property to the bank, and any defect in title will affect the charge so registered.

[85] Based on our findings of fact in this case, we are of the view that Hong Leong Bank's charge over the property has been rightly set aside by the learned HCJ because the transfer and charge pertaining to the property were done concurrently and should be treated as the same fraudulent transaction.

[86] Further, we are of the view that even if the charge is treated as a separate and distinct transaction, and Hong Leong Bank had acted *bona fide*, as the first defendant's title is being defeasible as a result of the fraud, she could not lawfully register any interest in favour of Hong Leong Bank. That would necessarily mean that the first defendant's title to the property is also tainted and therefore defeasible.

[87] We are guided by the Federal Court decision in the case of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] 5 MLRA 98; [2020] 4 MLJ 662; [2020] 5 AMR 645 wherein the Federal Court in dealing with the question as to whether the chargee bank with whom the perpetrator had charged the said land to, obtains an indefeasible charge, answered as follows:

> [92] *That being the case, the fides of the fourth defendant became irrelevant. The fourth defendant could have been a bona fide purchaser for value, or indeed, a truly an innocent one, but s. 340(2) of the NLC does not excuse such a circumstance, however innocuous*. A title or an interest registered that was obtained through the vitiating factors enumerated under s 340(2) of the NLC shall not be indefeasible and is liable to be set aside by the rightful owner of the subject property.
>
> (emphasis added)

[88] On this issue, the learned HCJ had made the following findings of fact when His Lordship held as follows:

> The Legal Consequence Of The Fraud
>
> The title of the first defendant
>
> 32. As a consequence of the first defendant's fraud, her title to the property became defeasible by reason of s. 340(2)(a) of the National Land Code.
>
> 33. In this case, the first defendant was privy to the fraud by which she had acquired title to the property in question, which in turn meant that her title was defeasible. I accordingly granted an order setting aside the registration of the property in the name of the first defendant.
>
> 34. The title of the first defendant was also defeasible on the alternative ground that the transfer of the property had been effected by means of a misrepresentation by the first defendant to the plaintiff: see *Datuk Jagindar Singh v. Tara Rajaratnam* [1983] 2 MLJ 196.
>
> The title of the fourth defendant
>
> 35. The next issue was whether the title of Hong Leong Bank, as chargee of the property was similarly defeasible.
>
> 36. The first question to be determined is whether the Hong Leong Bank, as the charge of the property, was an immediate or subsequent purchaser. If it was a subsequent purchaser, it would have been entitled to the protection accorded under s. 340(3) to a *bona fide* purchaser for valuable

consideration. I make the observation that there was no evidence before the court that suggested that the fourth defendant or any of its officers had been complicit in the fraud perpetrated by the first defendant.

37. On the other hand, if it was an immediate purchaser, then s. 340(3) afforded the bank no protection, and its registered charge would be defeasible.

38. In *He-Con v. Bulyah Ishak* [2020] 7 CLJ 271, the question arose whether the AmBank (M) Berhad, which held a charge over a property that was registered in the first defendant's name but had earlier been sold to the plaintiff, was an immediate or subsequent purchaser. The Federal Court ruled that AmBank as chargee was immediate purchaser, explaining:

> [102] The immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property that is being used as a security from a purchaser who is one that is bona fide for value. Any direct dealing with a rogue will necessarily vitiate the transaction rendering it defeasible, although it is duly registered.

39. In the present case, Hong Leong Bank, as chargee, had obtained its interests through its dealings with the first defendant. Accordingly, its title was defeasible, notwithstanding that it was not complicit in the fraud by the first defendant, and that it had no knowledge of the fraud.

40. I therefore set aside the fourth defendant's charge. As explained earlier, the fourth defendant had not appealed against this determination.

Conclusion

[89] As a conclusion, we find that this case does not warrant any appellate intervention as the learned HCJ had correctly allowed the plaintiff's claim after evaluating the contemporaneous documents and oral evidence of the witnesses. Quite clearly, the outcome of this case turned primarily on findings of fact. In our view, based on the evidence led during the trial, it cannot be said that the learned HCJ's conclusion upon the evidence was plainly wrong. Having considered the matter carefully and having due regard to the comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case. In our view, the learned HCJ, having considered all the evidence, was fully entitled to reach his evaluative judgment as per the grounds of judgment. Although the defendants had criticised the learned HCJ's approach and reasoning, we are not persuaded that the learned HCJ's approach was erroneous, the reasoning was flawed or the conclusions were wrong. It is apt for us to refer to the salient reminder by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67; [2020] MLJU 1469; [2020] 8 AMR 227; [2020] 6 MLRA 193 where it was said:

> [148] ... As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[90] We therefore dismiss the first defendant's appeal and affirm the decision of the learned HCJ dated 27 May 2021. We also make an order for costs of RM15,000 to the plaintiff, subject to allocator.